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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 1397

PATRICIA DROWN,

Petitioner,

v.

PORTSMOUTH SCHOOL DISTRICT, et al.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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Petitioner, Patricia Drown, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the First Circuit, entered in the above-entitled case on December 18, 1970.

OPINION BELOW

The opinion of the United States Court of Appeals for the First Circuit, reprinted in Appendix A to this Petition,[1] is not yet reported. No opinion was rendered by the United States District Court for the District of New Hampshire. The Order of the District Court, reprinted at page 15 of the

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[1] Referred to throughout this Petition as "App. A."

Appendix to Appellant's Brief[2] in the Court of Appeals, is unreported.

JURISDICTION

The judgment of the Court of Appeals was entered on December 18, 1970, and is reprinted in Appendix B to this Petition.[3] This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

QUESTION PRESENTED

In a suit brought under the Civil Rights Act of 1871, 42 U.S.C. §1983, petitioner raised two constitutional issues: (1) whether a nontenured teacher's rights of substantive due process under the Fourteenth Amendment of the United States Constitution are violated when a public educational institution refuses to renew the teacher's contract without providing any reason or justification, and (2) whether a nontenured teacher's rights of procedural due process under the Fourteenth Amendment are violated when a public educational institution, in refusing to renew the teacher's contract, fails to provide the teacher with adequate prior notice and the opportunity for a hearing.

The Court of Appeals below answered the first question in the affirmative, requiring school authorities to supply a teacher with "a written explanation, in some detail, of the reasons for non-retention, together with access to evaluation reports in the teacher's personnel file" (App. A, *infra* at 7a). Petitioner seeks no review of this determination.

The lower court, however, also held that under no circumstances did petitioner have a constitutional right to an administrative hearing on the nonrenewal of her contract—even if the nonrenewal had been in retaliation for petitioner's exercise of First Amendment rights or if the reasons for the nonrenewal had been arbitrary or otherwise constitutionally impermissible.

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[2] Referred to throughout this Petition as "R."

[3] Referred to throughout this Petition as "App. B."

The question presented before this Court, therefore, is whether the lower court was in error in refusing to find that a public educational institution's failure to provide a nontenured teacher with a hearing on the institution's determination not to renew the teacher's contract violates the teacher's rights of procedural due process under the Fourteenth Amendment of the United States Constitution.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The pertinent provisions of the Fourteenth Amendment of the United States Constitution are as follows:

> "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction equal protection of the laws."

2. The pertinent provisions of Section 1983 of the Civil Rights Act of 1871, 42 U.S.C. § 1983 are as follows:

> "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."[4]

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[4]The Court of Appeals in its opinion makes reference to N.H. Rev. Stat. Ann., ch. 189, § 14-a, which provides in pertinent part as follows:

> "Any teacher who has a professional standards certificate from the state board of education and who has taught for one or more years in the same school district shall be notified in writing on or before March 15 if he is not to be renominated or reelected. Any such teacher who has taught for three or more years in the same school district and who has been so

STATEMENT

Petitioner, a high school teacher whose performance had been rated "satisfactory" (R. 10), and whose quality of teaching had been extolled as having "relevancy" and as being "stimulating" (R. 13), was suddenly informed in March 1970 that her teaching contract would not be renewed for the next school year. No reason for the nonrenewal, nor any opportunity to question the decision in a hearing, was given by the school authorities (*see* R. 5, 6, 12).

The facts and circumstances relating to the nonrenewal of petitioner's contract and her subsequent action, claiming a deprivation of constitutional rights in violation of the Civil Rights Act of 1871, 42 U.S.C. § 1983, are set forth below.

Petitioner was a teacher of English in the Portsmouth, New Hampshire, High School during the 1968-69 and 1969-70 school terms (*see* R. 3, 9). She had previously taught in the Chicago public school system from September 1966 to June 1968 (R. 9).

On March 12, 1970, the high school principal and the assistant superintendent of schools had a meeting with petitioner. At the meeting, the assistant superintendent informed petitioner that "he had heard a lot of rumors" about her, and requested that, because she was "unhappy with the school system," she should resign her position at the high school effective June 1970 (R. 11). Thereafter, petitioner received a letter from the assistant superinten-

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> notified may request in writing within five days of receipt of said notice a hearing before the school board and may in said request ask for reasons for failure to be renominated or reelected. The school board upon receipt of said request, shall provide for a hearing on the request to be held within fifteen days. The school board shall issue its decision in writing within fifteen days of the close of the hearing."

Petitioner asserts that, even though she derives no right to a hearing from the statute, her right to such hearing is governed and protected by the Fourteenth Amendment. In an action under the Civil Rights Act, the New Hampshire statute is not controlling.

dent, "dated March 10, 1970 informing her that she would not be offered a contract for the 1970-71 school year" (*id.*). No reasons for the nonrenewal of the contract were given in the letter (*see* R. 5).

On March 15, 1970, petitioner wrote to the assistant superintendent, requesting a hearing as well as a list of reasons for the nonrenewal of her contract (R. 11). On March 17, the assistant superintendent, in reply, denied petitioner's request for a hearing and failed again to provide her with reasons for the nonrenewal of her contract (*id.*).

Aside from petitioner's alleged "unhappiness" with the Portsmouth school system and the undefined "rumors" about her (*see* R. 10-11), no reason for petitioner's contract nonrenewal was evident. There is nothing in the Record before the lower court even hinting that petitioner may have been incompetent or otherwise incapable of instructing in the subject assigned to her. In her *uncontested* affidavit, petitioner stated that she had "conducted her classes in a competent, professional manner"; had "attempted to bring the highest quality of teaching to her classroom"; had "always maintained high standards in the classroom"; and had "always been ready to listen to objective, professional criticism regarding the improvement of her classroom presentation" (R. 9-10). She further claimed that she had "done a good job in teaching at Portsmouth High School and that until March, 1970, the school administration [had] never indicated to her that her classroom teaching was anything less than excellent" (R. 10).[5]

In support of the statements in her affidavit, petitioner attached to the affidavit (*see id.*) a letter from the high school's assistant principal, dated March 15, 1969, marked "Exhibit A" (R. 13), extolling the high quality of her teaching:

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[5]The Court of Appeals characterized petitioner's four years of teaching as constituting "apparently satisfactory performance" (App. A, *infra* at 5a).

> "I was particularly impressed with the relevancy which you brought to your classes. Certainly this is an important way to involve young people in poetry and literature.
>
> "It was evident in the give and take that there was a mutual student-teacher respect. The manner in which you questioned your students was stimulating.
>
> * * *
>
> "Your teaching is in every respect satisfactory. It is a pleasure to have you at Portsmouth High School."

One year later, and just a few days prior to the nonrenewal of petitioner's contract, the assistant principal evaluated petitioner a second time, and noted that petitioner had been "performing satisfactory work in the four categories of said evaluation report" (R. 10).

As for her conduct while a teacher in Portsmouth, petitioner stated that she had "criticized and suggested improvements in the Portsmouth High School in areas of her responsibility including changes in the curriculum of the English Department" (R. 11). She believed that it was "the duty and obligation of a teacher to express her views on subjects directly relating to the manner and methods of teaching" and that her "criticisms were reasoned, logical suggestions for improvement of the school system and in no way were detrimental to said school system or detrimental to the conduct of her classes and areas of responsibility" (R. 11-12).

Following the school board's denial of her request for a hearing, petitioner brought suit in the Federal District Court for reinstatement and damages, pursuant to the Civil Rights Act of 1871, 42 U.S.C. §1983. The District Court entered a brief order without opinion, denying petitioner's motion for summary judgment (R. 8) and granting defendants' motion to dismiss (R. 7-8) "on the grounds that the complaint fails to state a cause of action under Title 42 United States Code, Section 1983" (R. 15).

On appeal, the First Circuit vacated the judgment of the District Court and remanded the cause for further proceedings (App. B, *infra*). The court held that (App. A, *infra* at 7a)–

> "the interests of the non-tenured teacher in knowing the basis for his non-retention are so substantial and that the inconvenience and disadvantages for a school board of supplying this information are so slight as to require a written explanation, in some detail, of the reasons for non-retention, together with access to evaluation reports in the teacher's personnel file."[6]

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[6]On December 29, 1970, eleven days after the decision by the First Circuit, the Portsmouth school authorities wrote petitioner the following letter:

> "Dear Mrs. Drown:
>
> "You were not offered a contract to teach in the Portsmouth School System for the 1970-71 school year for the following reasons:
>
> "1. In October 1969 you reported illness as a reason for not being able to teach on a particular day, yet you attended an Assembly of Delegates meeting. You were not a delegate to that meeting nor had you requested permission to attend.
>
> "2. While your class work was assessed as 'satisfactory', the English Department at the High School reports that you have been uncooperative, disregarding schedules and not accepting direction.
>
> "3. You were asked to attend a meeting with the Assistant Superintendent, Mr. Ryans and Mr. Thorburn to discuss your situation on February 19, 1970 at 1:30 P.M. per letter of Mr. Thorburn and also oral request, yet you refused to attend this conference. This refusal was forwarded in letter form to Messrs. Cusick, Thorburn and Ryans.
>
> "Of course you are entitled to access to the evaluation reports in your personnel file.
>
> "Sincerely,
>
> /s/ James J. Cusick
> Assistant Superintendent"

At the same time, the court rejected petitioner's argument "that the right to a statement of the reasons for not being rehired is meaningless unless the school board can be forced to prove those reasons at a hearing" (*id.* at 7a-8a). The court held instead that, under no circumstances, did an untenured teacher have a federal constitutional right to an administrative hearing when his contract was not renewed, even if the nonrenewal was for constitutionally impermissible reasons.[7]

REASONS FOR GRANTING THE WRIT

The issue in the present case—whether the due process clause of the Fourteenth Amendment requires a public educational institution to grant a nontenured teacher a hearing when the institution determines not to renew the teacher's contract for the next academic term—is exactly the same as one of the issues now pending on a petition for a writ of certiorari before this Court in *Perry v. Sindermann*, No. 952, O.T. 1970. It is also closely related to the question whether such a hearing is constitutionally required when a public educational institution dismisses a nontenured teacher during his contract term. This latter issue has been raised in *Fenton v. Boston School Committee*, No. 1026, O.T. 1970, now pending before this Court on appeal. Because of the similarity of the issues in the *Perry*, *Fenton* and present cases, this Court should grant certiorari in the present case

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[7] The court observed that its solution to the problem presented was novel and therefore applied its ruling in the following manner (App. A, *infra* at 12a-13a):

> "We apply the rule developed in this opinion to the appellant, in the event that the court finds that no such reasons have been given, by assuring her of a forthcoming communication of the reasons for her non-retention. We will apply the rule in the future only to those cases where a decision not to rehire is made subsequent to the date of this opinion. It also follows that appellant's claim for damages must be denied."

and set it for oral argument jointly with the other two cases.[8]

I. THE DECISION BELOW ADDS TO AN AS YET UNRESOLVED CONFLICT AMONG THE CIRCUITS ON THE PROCEDURAL DUE PROCESS ISSUE

In holding that a nontenured teacher whose contract has not been renewed has no constitutional right to an administrative hearing, even if the contract nonrenewal has been for constitutionally impermissible reasons, the First Circuit has added to an as yet unresolved conflict of the circuits. Aligning itself with the Eighth Circuit in *Freeman v. Gould Special School Dist.*, 405 F.2d 1153, *cert. denied*, 396 U.S. 843 (1969), and the Fourth Circuit in *Parker v. Board of Educ.*, 348 F.2d 464, *affirming*, 237 F. Supp. 222 (D. Md. 1965), *cert. denied*, 382 U.S. 1030 (1966), the First Circuit has set itself in diametrical conflict with the Fifth Circuit's position that an untenured teacher in a public educational institution has a constitutional right to an administrative hearing prior to the nonrenewal of his teaching contract if the teacher has an expectancy of reemployment,[9] or if he alleges that a constitutionally impermissible reason motivated the decision of contract nonrenewal. *Ferguson v. Thomas*, 430 F.2d 852, 856-57 (5th Cir. 1970); *Lucas v. Chapman*,

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[8]The suggestion of setting the *Perry* and *Fenton* cases together for oral argument was recently made by the National Education Association in its *Amicus Curiae* Memorandum (p. 4) in the *Fenton* case.

[9]The First Circuit stated that it was not impressed by the Fifth Circuit's distinction between nontenured teachers who had an expectancy of reemployment and those who did not. "Almost every teacher, arguably at least, has such an expectancy, and we think a teacher has an interest in employment protected by the due process clause independent of the existence of this quasi-contractual right" (App. A, *infra* at 4a n. 3).

430 F.2d 945, 948 (5th Cir. 1970); *Sindermann v. Perry*, 430 F.2d 939, 943-44 (5th Cir. 1970), *petition for a writ of certiorari filed*, No. 952, Sup. Ct., O.T. 1970, Nov. 9, 1970.

The First Circuit's decision is also in conflict with the decisions of several federal district courts which have held that such a nontenured teacher is entitled to an administrative hearing even if he has no "expectancy of reemployment" or makes no allegation that the decision not to renew the contract was made for constitutionally impermissible reasons. *Orr v. Trinter*, 318 F. Supp. 1041 (S.D. Ohio 1970); *Roth v. Board of Regents*, 310 F. Supp. 972 (W.D. Wisc. 1970); *Gouge v. Joint School Dist. No. 1*, 310 F. Supp. 984 (W.D. Wisc. 1970).

There is a vital need to resolve this conflict of judicial authorities. The procedural due process issue presented here arises with great frequency in teacher contract termination cases. Aside from the three cases now pending before this Court, we are aware of at least three additional cases, raising the same procedural due process issue, which are now pending on appeal in the federal courts of appeal. *Orr v. Trinter*, Dkt. No. 20721, 6th Cir.; *Roth v. Board of Regents*, Dkt. No. 18490, 7th Cir.; *Shirck v. Thomas*, Dkt. No. 18790, 7th Cir. Many similar cases are pending in the federal district courts and in State courts.

II. THE DECISION BELOW CONFLICTS WITH DECISIONS OF THIS COURT

Certiorari should also be granted because the holding of the court below, that a teacher's contract may be terminated without a hearing, conflicts with this Court's holding in *Slochower v. Board of Higher Educ.*, 350 U.S. 551 (1956). *Slochower* involved the summary dismissal of a professor at a city university under a New York City charter provision terminating the office or employment of any city employee who invoked his Fifth Amendment privilege against self-incrimination to avoid answering a question relating to his

official conduct. This Court reversed the dismissal of the complaint (*id.* at 559) on the ground that there had "not been the 'protection of the individual against arbitrary action' which Mr. Justice Cardozo characterized as the very essence of due process. Ohio Bell Telephone Co. v. Public Utilities Commission, 301 U.S. 292, 302. . . . " The Court held that "summary dismissal of appellant violates due process of law" (350 U.S. at 559). In so holding, the Court explained (*id.*):

> "The State has broad powers in the selection and discharge of its employees, and it may be that proper inquiry would show Slochower's continued employment to be inconsistent with a real interest of the State. But there has been no such inquiry here."

The present case also conflicts in principle with this Court's ruling in *Goldberg v. Kelly*, 397 U.S. 254 (1970), which held that a recipient of welfare benefits has a constitutional right to notice and an administrative hearing prior to termination of such benefits.[10] *Accord, Wheeler v. Montgomery*, 397 U.S. 280 (1970). Relying upon *Slochower* as a guide to its decision, the Court in *Goldberg* observed: "Relevant constitutional restraints apply as much to the withdrawal of public assistance benefits as to . . . discharge from public employment" (397 U.S. at 262).

In *Goldberg*, the Court, applying the "balancing test" of *Cafeteria & Restaurant Workers Union v. McElroy*, 367 U.S. 886, 895 (1961), found that the private interest involved in requiring a pretermination hearing far outweighed any conflicting governmental interest (397 U.S. at 264):

> "For qualified recipients, welfare provides the means to obtain essential food, clothing, housing, and medical care. . . . [T]ermination of aid pending resolution of a controversy over eligibility may

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[10] Such welfare benefits, said the Court, were "entitlements" to be regarded "more like 'property' than a 'gratuity' " (397 U.S. at 262 n. 8).

> deprive an *eligible* recipient of the very means by which to live while he waits. Since he lacks independent resources, his situation becomes immediately desperate. His need to concentrate upon finding the means for daily subsistence, in turn, adversely affects his ability to seek redress from the welfare bureaucracy."

Recently, in *Ricucci v. United States*, 425 F.2d 1252, 1257 (Ct. Cl. 1970) (concurring opinion), the private interest deemed to be affected by the termination of welfare benefits in *Goldberg* was likened to the private interest considered to be affected by the discharge of a government employee:

> "All of the foregoing could be, and probably should be applied to most discharged government employees. Few of them earn more than enough to pay their living expenses from month to month, and when their salaries are cut off they may be in the same destitute circumstances as a welfare recipient whose aid has been discontinued. In any event, if there is any difference, it is only a matter of degree."

Comparable considerations are at stake when a nontenured teacher's contract is not renewed.

Finally, the present case conflicts in principle with this Court's ruling in *Wisconsin v. Constantineau*, 39 U.S. L. Week 4128 (Jan. 19, 1971), which held the Wisconsin "posting" statute unconstitutional for failure to accord any procedural due process. In *Constantineau*, this Court declared: "Where a person's good name, reputation, honor, or integrity are at stake because of what the government is doing to him, notice and an opportunity to be heard are essential" (*id.* at 4129).

Several lower federal courts similarly have recognized that the nonrenewal of a nontenured teacher's contract adversely affects a teacher's good name and professional reputation and have accordingly required the procedural due process protection of prior notice and a hearing.

In *Roth v. Board of Regents*, 310 F. Supp. 972, 979 (W.D. Wisc. 1970), *pending on appeal*, Dkt. No. 18490, 7th Cir., the district court stated that "nonretention . . . creates concrete and practical difficulties for a professor in his subsequent academic career," and that, "in terms of money and standing and opportunity to contribute to the educational process, the consequences to him probably will be serious and prolonged and possibly will be severe and permanent." The court concluded that "[s]ubstantive constitutional protection . . . against non-retention in violation of . . . First Amendment rights or arbitrary non-retention is useless without procedural safeguards" (*id.* at 979-80).

In *Orr v. Trinter*, 318 F. Supp. 1041, 1046 (S.D. Ohio, 1970), *pending on appeal*, Dkt. No. 20721, 6th Cir., the district court agreed that a nontenured teacher whose contract is not renewed "indisputably . . . faces the possibility of some damage to his professional reputation and to his ability to pursue his chosen profession." The *Orr* court further noted that "this interest of plaintiff in his professional standing and reputation is separate and apart from any interest in a particular job" (*id.* at 1045). The court consequently held (*id.* at 1046):

> "[T]he interests of the school board and those of the teacher will both be fully protected by a procedure which advises the nontenured teacher of a proposed purpose not to renew his contract and affords him a hearing at which the legitimacy of the reasons compelling such action is determined."[11]

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[11] *Accord*, Gouge v. Joint School Dist. No. 1, 310 F. Supp. 984, 992 (W.D. Wisc, 1970): "[A school] board's ultimate decision may not rest on a basis of which the teacher was never notified, nor may it rest on a basis to which the teacher has no fair opportunity to respond"; Domenicone v. School Committee of Smithfield, R.I. Comm'r. of Educ., May 20, 1970, at 4 (unreported) (holding that the nonrenewal of a nontenured teacher's contract "can mean the end of [the teacher's] professional career" and that therefore procedural due process was required); *cf.* Birnbaum v. Trussel, 371 F.2d 672 (2d Cir. 1966); Meredith v. Allen County War Mem. Hosp. Comm'n., 397 F.2d 33 (6th Cir. 1968).

III. THE DECISION BELOW WILL HAVE A DELETERIOUS EFFECT ON THE PROTECTION OF THE SUBSTANTIVE CONSTITUTIONAL RIGHTS OF TEACHERS

Although the lower court required that a public educational institution must give a written explanation of the reasons for nonretention, it provided no means for determining the validity of those reasons within the administrative structure. Even in those instances in which the teacher asserts a violation of specific constitutional rights, such as nonrenewal of his contract in retaliation for the exercise of First Amendment rights, or in which the teacher asserts that the school authorities acted in bad faith, the court of appeals held that an administrative hearing is not constitutionally required. As the court explained (App. A, *infra* at 10a):

> "[T]he teacher asserting a constitutional right has guaranteed access to the federal courts . . . . As to the teacher's interest in guarding against bad faith decisions, we first observe that . . . the requirement that detailed reasons be assigned is some hindrance to a board so motivated. Secondly, bad faith may rise to a constitutional level, in which case the federal courts are available, or, if not of this magnitude, it may be subject to a state court remedy in tort. . . ."[12]

[12] The court also stated (App. A, *infra* at 10a): "It is not easy for us to believe that a significant number of decisions not to rehire nontenured teachers rest on either ground." *But see* Van Alstyne, *The Constitutional Rights of Teachers and Professors*, 1970 Duke L.J. 841 n.† (1970): "In the past academic year alone, the American Association of University Professors acted on nearly 750 complaints." *See also id.* at 859; Brief of the National Education Association as *Amicus Curiae*, Jones v. Hopper, 397 U.S. 991 (1970) (*denying cert.*), at pp. 1a-4a, setting forth a parial listing of decided and pending cases involving the nonrenewal of contracts of nontenured teachers in retaliation for the exercise of First Amendment rights.

It should also be noted that, if the First Circuit's concept of a "bad faith" decision by school authorities is narrowly interpreted to confine the availability of the federal courts to cases involving showings of actual malice, a wide range of arbitrary contract nonrenewal

The First Circuit's reliance on "guaranteed access" to the courts ignores the practical difficulties of litigation. Courts alone cannot effectively protect a teacher from the dereliction of school authorities. As stated by Professor William Van Alstyne in his recent article on *The Constitutional Rights of Teachers and Professors,* 1970 Duke L.J. 841, 859-60 (1970):

> "Faculty members are not litigious by nature, the costs of formal controversy are high and usually must be borne personally, the burden of proof—often exceedingly difficult to carry—falls upon the plaintiff-teacher, and the ordinary case may not reach judgment for months or even years after the plaintiff has been separated from his job. In addition, the teacher must face the practical recognition that the extralegal hazards of such litigation are themselves quite great: to sue and to lose establishes a public record against oneself as a teacher and may further prejudice one's chances for employment or advancement. To sue and to win will not permit one actually to resume teaching at the institution in most instances, and it will almost certainly spread upon the public record whatever evidence of the plaintiff's shortcomings the defending institution can muster—thereby warning other institutions which may be chary of seemingly irascible professors who sue their employer and 'launder their linen' in public places."

As a result of these practical difficulties, Professor Van Alstyne concludes that (*id.* at 860)—

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decisions would presumably be excluded from review. "The 'sincerity' of an administrator's decision can seldom be challenged; it is its reasonableness which is most often called into question. . . . [A]n arbitrary dismissal can arise from a multitude of motives; an attempt to control all the variations of administrative action by reference to a simple dualism of good or evil hinders adequate analysis and may help to mask patent injustice." Note, *Dismissal of Federal Employees—The Emerging Judicial Role,* 66 Colum. L. Rev. 719, 725-26 (1966) (footnotes omitted).

> "the effective protection of the substantive constitutional rights of teachers and professors may critically depend upon the availability of pretermination procedural due process. Post-termination judicial remedies for teachers, like post-suspension remedies for students or post-eviction remedies for tenants, are often simply too little and too late. . . ."[13]

CONCLUSION

For the foregoing reasons, this Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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Dated: February 1971

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[13] *See* Van Alstyne, *The Demise of the Right-Privilege Distinction in Constitutional Law,* 81 Harv. L. Rev. 1439, 1453 (1968). There are also a number of positive values that an administrative adversary hearing fulfills. These values include the promoting of accuracy, fairness, accountability, visibility, impartiality, consistency and integrity in the administrative authorities. *See* O'Neil, *Of Justice Delayed and Justice Denied: The Welfare Prior Hearing Cases,* 1970 Sup. Ct. Rev. 161, 184-90.

APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE FIRST CIRCUIT

No. 7667.

PATRICA DROWN,

Plaintiff-Appellant,

—v.—

PORTSMOUTH SCHOOL DISTRICT, *et al.,*

Defendants-Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW HAMPSHIRE

Before ALDRICH, *Chief Judge,*
McENTEE and COFFIN, *Circuit Judges.*

Jack B. Middleton, with whom *Peter B. Rotch* and *McLane, Carleton, Graf, Greene & Brown* were on brief, for appellant.

John C. Driscoll for appellees.

Bradley F. Kidder and *Nighswander, Lord, Martin & KillKelley* on brief for The New Hampshire School Boards Association, amicus curiae.

David Rubin, Richard J. Medalie, Alvin Friedman, and *Epstein, Friedman and Duncan* on brief for The National Education Association, amicus curiae.

December 18, 1970.

COFFIN, *Circuit Judge*. Appellant, a public school teacher, brings this action pursuant to 42 U.S.C. § 1983 against the Portsmouth School District, the administrator, and the school board members of the district. She claims that appellee's failure to offer her a teaching contract for the 1970-71 school year deprived her of rights guaranteed to her by the Constitution.

Appellant was employed as a non-tenured teacher for the 1968-69 and 1969-70 school years. For each year, she was employed under a standard one-year contract. Under New Hampshire law and pursuant to appellant's one-year contract, a non-tenured teacher may not be dismissed without cause and without being afforded certain procedural rights *during* the school year, and tenured teachers are entitled to similar safeguards if they are not rehired. N.H. Rev. Stat. Ann. ch. 186, § 13. But a failure to rehire a non-tenure teacher affords the teacher no rights other than to notification by March 15 of the school year. N.H. Rev. Stat. Ann. ch. 186, § 14-a.

Appellant was given timely notice that she would not be rehired for the 1970-71 school year. She sought and was denied a list of reasons for this decision and a hearing so that she might have an opportunity to challenge it. Her complaint, which was dismissed below as failing to state a cause of action, claims that she was not afforded due process by the school district. She argues that she was denied certain rights, principally that of a hearing when the school district decided not to rehire her.[1]

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[1] Along with the right to a hearing, appellant and the National Educational Association as Amicus Curiae, ask this court to detail other safeguards to which appellant is entitled, including (1) the right to cross-examine witnesses; (2) the right to present both oral

Appellant's contract with appellees implies that the school district has virtually unlimited discretion to rehire her or not. *See* Note, *Developments in the Law—Academic Freedom*, 81 Harv. L. Rev. 1045, 1099-1100 (1968). Nevertheless, there is no doubt that appellant has an interest in being rehired sufficient to prevent the school district from not doing so for constitutionally impermissible reasons. *Slochower* v. *Board of Higher Education of New York City*, 350 U.S. 551 (1956); *Johnson* v. *Branch*, 364 F.2d 177 (4th Cir., *en banc*, 1966), *cert. denied*, 385 U.S. 1003 (1967); *Albaum* v. *Carey*, 283 F. Supp. 3 (E.D. N.Y. 1968). *See generally*, Van Alstyne, *The Demise of the Right-Privilege Distinction in Constitutional Law*, 81 Harv. L. Rev. 1439, 1445-58 (1968); Davis, *The Requirement of a Trial-Type Hearing*, 70 Harv. L. Rev. 193, 233-43 (1956). But appellant makes no claim of any violation of her collateral constitutional rights; she merely says that the process by which the decision not to rehire her was made does not comport with the fundamental fairness guaranteed her by the Fourteenth Amendment.

Courts are divided on the issue of the administrative procedural rights to which a non-tenured public school teacher is entitled when he is not rehired. Some say that the teacher has no right to an administrative hearing, although he does have a legal remedy, if he was dismissed for constitutionally impermissible reasons such as his race or

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and written arguments; (3) the right to retain counsel; (4) the right to a determination based solely on legal rules and the evidence adduced at the hearing; (5) the right to statement by the decision-maker of his reasons and of the evidence relied on; (6) the right to an impartial decision-maker other than the school board; (7) the right to a hearing on the record so that a verbatim transcript can be made; and (8) the right to be advised of these rights. Presumably, they would also include the right to judicial review.

the exercise of First Amendment rights. *Freeman* v. *Gould Special School District of Lincoln County, Arkansas,* 405 F.2d 1153 (8th Cir. 1969), *cert. denied,* 396 U.S. 843 (1969).[2] Others have held that a non-tenured teacher is entitled to a hearing even when there is no allegation that the decision not to rehire was made for constitutionally impermissible reasons. *Orr* v. *Trinter,* —— F. Supp. —— (S.D. Ohio, Aug. 3, 1970); *Roth* v. *Board of Regents,* 310 F. Supp. 972 (W.D. Wisc. 1970); *Gouge* v. *Joint School District No. 1,* 310 F. Supp. 984 (W.D. Wisc. 1970). Still others have taken a middle course, requiring administrative hearings only when there is an allegation that a constitutionally impermissible reason motivated the decision not to rehire. *Ferguson* v. *Thomas,* 430 F.2d 852 (5th Cir., 1970); *Sindermann* v. *Perry,* —— F.2d —— (5th Cir., Aug. 10, 1970).[3] We are faced with this precise question for the first time.[4]

To determine what, if any, procedures are required when a school board decides not to rehire a non-tenured teacher, we are required to balance the competing interests of the individual teacher and of the school board. *Cafeteria &*

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[2] For a critical analysis of this opinion, see Note, 44 N.Y.U. L. Rev. 836 (1969).

[3] The Fifth Circuit distinguishes between non-tenured teachers who have an expectancy of reemployment and those who do not. Those with an expectancy of reemployment are entitled to the full procedural rights of a teacher with tenure. We are not impressed by this distinction. Almost every teacher, arguably at least, has such an expectancy, and we think a teacher has an interest in employment protected by the due process clause independent of the existence of this quasi-contractual right. *Cf. Birnbaum* v. *Trussell,* 371 F.2d 672 (2d Cir. 1966).

[4] We have, however, decided an analogous case. In *Medoff* v. *Freeman,* 362 F.2d 472 (1st Cir. 1966), we held no hearing was required to guarantee due process to a dismissed probationary government employee who had been informed of the reasons for his dismissal.

Restaurant Workers Union v. *McElroy*, 367 U.S. 886 (1961); *cf. Goldberg* v. *Kelly*, 397 U.S. 254 (1970); Van Alstyne, *The Constitutional Rights of Teachers and Professors*, —— Duke L. J. —— (1970) (draft of article submitted by counsel). The school board is interested primarily in its ability to insure the quality of the school system by employing teachers for a probationary period. During this period, the board attempts to evaluate teaching ability to determine if the teacher merits tenure. Such evaluations require judgments about many subjective factors which are difficult to document with precision, such as the ability of the teacher to inspire students, his mastery of and progress in his subject, and his capacity to work effectively with colleagues, supervisors, and parents.

The teacher, particularly one at the outset of his career, is in the position of having invested in preparation for a career which depends mainly on the willingness of public bodies to employ him. Such willingness, as the complaint alleges, is seriously dissipated if not destroyed when an early employer refuses to rehire the teacher. In the present case the plaintiff, after four years of apparently satisfactory performance in Illinois and New Hampshire, confronts a decision not to rehire her without any reason given. This effectively forecloses her from attempting any self improvement, from correcting any false rumors and explaining any false impressions, from exposing any retributive effort infringing on her academic freedom, and from minimizing or otherwise overcoming the reason in her discussions with a potential future employer.

Against this background of competing interests, we assess the benefits and burdens of the rights claimed by appellant. We first examine the effect on both the teacher

and the school authorities of a right to receive a detailed statement of reasons for non-retention, accompanied by access to any teaching evaluation reports.[5] From the point of view of the teacher, such notice would give him the opportunity informally to correct a decision made on the basis of mistaken or false facts. Moreover, he might find that he had evidence that could be used to support a claim that he was not rehired for constitutionally impermissible reasons. Even if the reasons assigned were false ones, demonstrating their falsity would have probative value in a claim that the real reasons lie elsewhere. Additionally, the teacher would have the extra benefit of knowing where his performance failed to live up to expectations—a benefit that may not be constitutionally required but which is surely desirable. Finally, if the reason were to lie in a judgment that the teacher was too innovative and unconventional, this very fact might be turned into a recommendation in the eyes of another possible employer.

From the viewpoint of the school board, a requirement that it state its reasons for not rehiring a non-tenured teacher would impose no significant administrative burden. Nor would it significantly inhibit the board in ridding itself of incompetent teachers. The workability of such a requirement is evident from the fact that several states presently require their school boards to do so. *E.g.*, Wash.

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[5] *See* Frakt, *Non-Tenure Teachers and the Constitution*, 18 U. Kan. L. Rev. 27, 50-53 (1969).

Access to reports would seem to be a logical consequence of any right to receive a statement of reasons. To the extent that they are consistent with and foreshadow the reasons for non-retention, they both corroborate and give some depth to those reasons. To the extent that, as in the instant case, prior reports do not foreshadow dissatisfaction on the part of the teacher's superiors, the right to access would tend to restrain a board from assigning capricious reasons for its present dissatisfaction.

Rev. Code Ann. § 28.67.070 (1964).[6] As to access to administrative evaluations, we would assume that, since part of their objective is to help the teacher improve, their content is made known to the teacher as a matter of policy.[7] Access as of right has been granted in a number of states. *E.g.*, Conn. Gen. Stat. Ann. § 10-15(a) (Supp. 1969). Finally, while access by a teacher to an administrator's frank appraisal of his ability might lead to embarrassment and friction if the teacher-administrator relationship were to continue, such a consideration is moot when the teacher has not been rehired. The relationship could be further impaired only in the unlikely case that the decision not to rehire were reversed despite negative reports; and in such a case, the avoidance of an unjustified non-retention must outweigh the danger of disharmony.

We therefore hold that the interests of the non-tenured teacher in knowing the basis for his non-retention are so substantial and that the inconvenience and disadvantages for a school board of supplying this information are so slight as to require a written explanation, in some detail, of the reasons for non-retention, together with access to evaluation reports in the teacher's personnel file.[8]

Appellant, however, argues further that the right to a statement of the reasons for not being rehired is meaning-

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[6] Alaska entitles a non-tenured teacher to a statement of reasons and a complete bill of particulars. Alaska Stat. § 14.20.180(a) (1962). Further discussions of varying state procedures can be found in Frakt, *supra* at 28-30; and *Developments in the Law—Academic Freedom*, *supra* at 1091-92.

[7] In fact, appellant in this case has received some such reports, possibly all that exist.

[8] A similar result, in a different employment situation, was reached in *Olson* v. *Regents of the University of Minnesota*, 301 F. Supp. 1356 (D. Minn. 1969).

less unless the school board can be forced to prove those reasons at a hearing. As an initial response, we note that a hearing is not constitutionally compelled in all cases where individual rights may be impaired.

> "The Fifth Amendment does not require a trial-type hearing in every conceivable case of government impairment of private interests . . . . The very nature of due process negates any concept of inflexible procedures universally applicable to every imaginable situation." *Cafeteria & Restaurant Workers Union* v. *McElroy, supra* at 894-95.

It is obvious that the kind of hearing sought by appellant, *see* note 1, *supra,* would involve the full trappings of counsel, cross-examination, rules of evidence, a verbatim record, and a decider other than the school board. Not only would the invoking of such adjudicative apparatus be an added, expensive and unfamiliar obligation for the school district, but the very existence of the right of a non-tenured teacher to such a hearing would have two side effects, equally unfortunate. In the first place, administrators would be less likely to recommend that teachers not be rehired if they knew that such a decision might require them to go through the tir. expense, and often the personal discomfort of a full scale hearing. In such circumstances, the school board is more likely to tolerate incompetent teachers. At the same time, administrators would, to avoid these difficulties in the future, follow a counsel of over-caution in their hiring practices. The innovative teacher would have a more difficult time finding employment if school districts fear they cannot afford to take a chance on him. And the schools would be left with a teaching force of homogenized mediocrities.

Such risks and burdens for the school board might be tolerable if the right to a hearing gave promise of high and unique usefulness in safeguarding the protectible interests of the non-tenured teacher. We therefore inquire as to the nature of these interests and the extent to which they would be served by a hearing.[9]

One interest might well be the opportunity for a probationary teacher in the system to explain his teaching philosophy and methods, which may be at odds with those of his supervisor. But in the light of the school board's wide discretion, and its prerogative to be short-sighted and narrow-minded, a hearing would not be likely to settle the clash of the value judgments any more effectively than informal discussions—assuming, of course, that the teacher is aware of the objections, as he would be if detailed notice is given. A second interest may lie in identifying factually incorrect reasons for non-retention. Once again, if the teacher is made aware of the reasons, and if the school board is acting in good faith, the machinery of a hearing would not appear to be necessary to clear up the misunderstanding.

There remain the teacher's interest in protecting his constitutional rights, such as free speech, and in protect-

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[9] We note, preliminarily, that in any such hearing the burden of persuasion, because of the subjective factors on which a school board may legitimately base its decision on rehiring, would rest on the teacher. For example, testimony concerning a teacher's failure to communicate enthusiasm to his students would have to be conclusory in nature—"He was, or was not inspiring". Even were we to require that appellant be given an administrative hearing, we think that she would have to bear the burden of persuading the decision-maker that the decision not to rehire her was an incorrect one; our research reveals no authorities who argue that the school board should bear the burden of proving its decision correct. *See, e.g.*, *Developments in the Law—Academic Freedom, supra* at 1092; Note, 44 N.Y.U. L. Rev. 836, 842-43 (1969).

ing himself against a decision made in bad faith. It is not easy for us to believe that a significant number of decisions not to rehire non-tenured teachers rest on either ground. In any case, the teacher asserting a constitutional right has guaranteed access to the federal courts. While an administrative hearing may help the teacher by way of flushing up constitutionally impermissible reasons, the chief beneficiaries are the school board itself, which can only profit from reviewing a decision before being subject to possible liability, and the courts, which do not seek unnecessary litigation.[10] From the teacher's point of view, there is little reason for him to prefer the prospect of two full scale constitutional presentations where one could suffice. As to the teacher's interest in guarding against bad faith decisions, we first observe that, as we have noted, the requirement that detailed reasons be assigned is some hindrance to a board so motivated. Secondly, bad faith may rise to a constitutional level, in which case the federal courts are available, or, if not of this magnitude, it may be subject to a state court remedy in tort. *See* W. Prosser, *Handbook of the Law of Torts,* § 126, at 1015-16 (3d ed. 1964). Moreover, an absolute safeguard against the possibility of covert bad faith would involve school boards delegating crucial rehiring decisions to third parties—a resolution which would spawn a host of other problems not the least of which would be the erosion of the educational policy function of school boards. On balance, we conclude that the residual possibility of decisions made in bad faith

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[10] We therefore normally require resort to available administrative hearing prior to initiation of a section 1983 action. See *Dunham* v. *Crosby,* —— F.2d ——, n. 2 (1st Cir., decided this date).

concerning non-tenured teachers does not justify the judicial imposition on the public school systems of the nation of adjudicative hearing procedures.[11]

We recognize that there may, under our solution, be rare instances where an improperly dismissed teacher would not be adequately protected. We wish to stress, however, that our decision here is limited to the case of a non-tenured teacher whose contract is not renewed during a probationary period. Non-tenured teachers are made aware that they have no right to reemployment by their employment contracts which run for only one year and which entitle them to a hearing only if they are dismissed during the course of the year.[12] While it is true that the effect of a decision not to rehire may be the same as dismissal, the teachers have made a contract which entitles them to pro-

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[11] In *Roth* v. *Board of Regents, supra,* cited with approval by appellant, the court stated "[I]t is reasonable that there be available a very wide spectrum of reasons, some subtle and difficult to articulate and to demonstrate, for deciding not to retain a newcomer. . . ." 310 F. Supp. at 978. We find it difficult to believe that the scrutiny by either an administrative or a judicial hearing of a decision made on such nebulous but admittedly valid grounds would afford a teacher meaningful protection from arbitrary decisions.

Similarly, we think a requirement that a teacher be afforded an administrative hearing if he makes a constitutional claim or a claim of an actionable wrong, *see Sindermann* v. *Perry, supra,* offers the teacher little more protection than the status quo. Presently, the teacher can make such a claim in the courts, a forum undoubtedly more suited to evaluating them.

[12] Although the requirement that non-tenured teachers be notified by March 15 if they are not to be reemployed may be interpreted as giving the teacher a right to a continuing contract unless notified, the primary right is to notice, not to continued employment. Without a fixed date by which notice must be given, New Hampshire teachers might not have time to search for another job if they were not rehired. To compel school districts to notify teachers in time, the districts are required to offer a contract if they fail to give timely notice. Thus, while non-tenured teachers have a right to notice, they have no right to be rehired except to enforce the notice requirements.

cedural rights only when they are dismissed. Teachers are not powerless to change the terms of their contracts; the procedural rights of non-tenured teachers who are not rehired vary widely from state to state. *See Developments in the Law—Academic Freedom, supra* at 1091-92. Non-tenured teachers who do not like the terms of New Hampshire's contracts can either bargain to change them[13] or can seek employment in states where the terms are different. Thus, in balancing the interests of the school board and the teacher, we must remember that the teachers have agreed to the procedural scheme and that teachers are not powerless to alter the scheme or find employment under a different scheme.

Under the circumstances, we hold that a hearing is not required and that the interests of society, in promoting a better school system, and in protecting the rights of the individual, are best served by the solution we put forth. Since, however, this solution is novel, the defendant cannot in fairness be subjected to the sanctions which ordinarily accompany the violation of pre-existing law. *Cf. Great Northern Ry.* v. *Sunburst Oil & Refining Co.*, 287 U.S. 358 (1932). We apply the rule developed in this opinion to the appellant, in the event that the court finds that no such reasons have been given, by assuring her of a forthcoming

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[13] Since the provisions of New Hampshire's contracts are determined by law, this is not a normal collective bargaining situation, but to say that teachers cannot bargain to alter laws that affect the terms and conditions of their employment would require the court to shut its eyes to what has happened in the past few years in bargaining between public employees and their employers. *See generally,* Wellington & Winter, *The Limits of Collective Bargaining in Public Employment,* 78 Yale L. J. 1107 (1969).

communication of the reasons for her non-retention. We will apply the rule in the future only to those cases where a decision not to rehire is made subsequent to the date of this opinion. It also follows that appellant's claim for damages must be denied.

The judgment is reversed and the cause remanded for further proceedings consistent with this opinion.

APPENDIX B

UNITED STATES COURT OF APPEALS

FOR THE FIRST CIRCUIT

No. 7667.

PATRICIA DROWN,
Plaintiff, Appellant,

v.

PORTSMOUTH SCHOOL DISTRICT ET AL.,
Defendants, Appellees.

JUDGMENT

Entered December 18, 1970

This cause came on to be heard on appeal from the United States District Court for the District of New Hampshire, and was argued by counsel.

Upon consideration whereof, It is now here ordered, adjudged and decreed as follows: The order of the District Court is vacated and the cause is remanded for further proceedings consistent with the opinion filed this day. Costs to appellant.

By the Court:

/s/ Dana H. Callup
Clerk

SUPREME COURT, U.S.

FILED

APR 21 1971

E. ROBERT SEAVER, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 1397

PATRICIA DROWN,

Petitioner,

V.

PORTSMOUTH SCHOOL DISTRICT, et al.,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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PORTSMOUTH SCHOOL DISTRICT, et al.

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

STATEMENT

This case involves an action brought by a teacher in Supervisory Union No. 52 against that Union's School Board, its Superintendent and Assistant Superintendent under the provisions of a Federal Civil Rights Act (Civil Rights Act of 1871, 42 U.S.C. 1983).

The petitioner first entered into a one year contract to teach in the 1968-1969 school year. A second one year contract was entered into for the 1969-1970 school year.

Prior to March 15, 1970 the petitioner was notified by the office of the Superintendent that she would not be nominated by him to the School Board for election to a third one-year contract.

Petitioner requested of the office of the Superintendent a hearing by the School Board and "the causes of this refusal" of

her contract. The School Board denied this request for a hearing and did not provide her with any list of causes.

Petitioner filed a complaint in the U. S. District Court for New Hampshire asserting that her services as a teacher could not be terminated (even though she only had an annual contract) and that by not being renominated, afforded a hearing and given the reasons for non-retention the action of the Board was arbitrary and capricious and therefore violative of her "due process rights". She did not assert that her failure to be renominated was the result of her exercise of free speech, discrimination because of her race, color, creed, sex or place of national origin.

Respondents filed a motion before the District Court praying that the action be dismissed because the complaint failed to state a claim against the respondents upon which relief could be granted. Teacher contracts are governed by New Hampshire law - statutory law. A teacher who has taught for less than three years is not considered to be "tenured". Tenured teachers may not have contract non-renewal without the right to a requested hearing and further appeal to the State Board of Education.

Defendants' motion to dismiss (filed pursuant to F. R. Civ. P. 12) asked to dismiss the action because the City of Portsmouth does not operate a system of public schools within the City and further that the Superintendent, his assistant and the School Board members have no individual or official capacity with the municipal corporation of the said City of Portsmouth. This motion was filed April 28, 1970. The Marshal's return of service was filed with the District Court on April 17, 1970.

On May 21, 1970, Petitioner filed with the District Court a Motion for Summary Judgement with Affidavit. This Motion and Affidavit having been purportedly filed pursuant to Rule 56 of the Federal Rules of Civil Procedure. On April 29, 1970, the District Court notified the parties that the defendants motion to dismiss would be heard on May 27, 1970, this being prior to the allowed time to respond to the Motion for Summary Judgment and Affidavit.

On May 27, 1970, but yet subsequent to the 1:30 P.M. hearing on the Motion to Dismiss of Respondents, the Petitioner filed a motion to amend seeking to substitute Portsmouth School District as a party Defendant instead of the City of Portsmouth.

On June 2, 1970, the District Court granted the Petitioner's

motion to amend, denied petitioner's motion for summary judgement, and granted the Respondents motion to dismiss on the grounds that the complaint failed to state a cause of action under 42 U.S.C. 1983. On June 22, 1970, Petitioners filed an appeal with the U. S. Circuit Court of Appeals from the order granting the motion to dismiss.

On December 18, 1970, the U. S. Court of Appeals for the First Circuit vacated the decision of the District Court and remanded the cause for further proceedings consistent with the opinion of the Court. The Court had ruled that there could be no damages, that the teacher was not entitled to a hearing but that the teacher was entitled to be given reasons and access to evaluation reports in the teachers personnel file. *(Drown v. Portsmouth School Dist.*, 1st Cir. 1970, No. 7667).

The allegations and statements of Petitioner as to her teaching, attitude, proficiency, etc. are only non-evidentiary self-serving declarations which have not yet gotten to court.

REASONS FOR NOT GRANTING THE WRIT

The issue in the present case is sufficiently clear and has been pronounced upon in other cases where this Court has over the recent years denied certiorari from cases in several of the Circuits. To do as Petitioner suggests would open a Pandora's box which courts ought not to do.

As the First Circuit Court of Appeals stated: "... While it is true that the effect of a decision not to rehire may be the same as a dismissal, the teachers have made a contract which entitles them to procedural rights only when they are dismissed. Teachers are not powerless to change the terms of their contracts; the procedural rights of non-tenured teachers who are not rehired vary widely from state to state. See Developments in the Law - Academic Freedom, Supra at 1091-92. Non-tenured teachers who do not like the terms of New Hampshire contracts can either bargain to change them or can seek employment in states where the terms are different. Thus, in balancing the interests of the school board and the teacher, we must remember that the teachers have agreed to the procedural scheme and that teachers are not powerless to alter the scheme or find employment under a different scheme."

In *Beatie v. Roberts*, — F.2d—. (1st Cir. Jan. 6, 1971) the Court buttressed this position with a contention that it would

be beyond the power of the Court and a trespass into legislative territory. At pp. 7 & 8 that Court said, "If we required the state or municipalities to create neutral bodies to which the Committee's (School Board's) decision to dismiss could be appealed, we would be engrafting into educational administration an appellate layer of enormous complexity, and might well exceed the boundaries of our judicial authority and trespass into legislative territory."

This Court in *Slochower v. Bd. of Higher Education*, 350 U. S. 551 (1966) held that to summarily discharge a municipal employee who had invoked his constitutional right against self incrimination was not permitted. This Court did not say that an employee could not be terminated when it was not being done for constitutionally impermissible reasons.

This Court denied certiorari in *Jones v. Hopper*, 410 F.2d 1323 (10th Cir. 1969), cert. denied 90 S.Ct. 1111 (1970). In that case a college professor alleged in a Civil Rights Act complaint that the Board of Trustees of Southern Colorado State College had denied him a right of expectancy of employment because he had sought to exercise his rights of speech, publication and religion, in that the Board had refused to reappoint him after his term of employment had expired. There the Tenth Circuit said: "We believe the appellees herein were exercising a discretion given them by the power vested under the Colorado statute . . . (power to contract and fail to renew contracts of employees). The exercise of this discretion cannot, under the facts alleged in the complaint become unlawful conduct which would justify its falling within the ambit of the Civil Rights Act"

"It would be intolerable for the Courts to interject themselves and to require an educational institution to hire or to maintain on its staff a professor or instructor whom it deemed undesirable and did not wish to employ. For the Courts to impose such a requirement would be an interference with the operation of institutions of higher learning contrary to established principles of law and to the best traditions of education." 410 F.2d at 1326.

This Court again denied certiorari in *Johnson v. Branch*, 364 F.2d 177 (4th Cir. 1966), cert. denied 385 U. S. 1003, 87 S.Ct. 706 (1967). There it was decided by the Fourth Circuit that where teachers contracts are for one year only and renewable in the discretion of the school authorities, the District Court is not to infringe upon this discretionary power but rather is to be

concerned only with whether or not such power is used based on impermissible constitutional grounds.

This Court again denied certiorari in *Freeman v. Gould Special School District*, 405 F.2d 1153 (8th Cir.) cert. denied 396 U. S. 843 (1969). In this case it was decided that due process of law only requires that a teacher's termination not be for constitutional impermissible reasons. (See also *Parker v. Board of Educ.*, 348 F.2d 464, affirming 237 F.Supp. 222 (D.Md. 1965) cert. denied, 382 U. S. 1030).

As was stated by the First Circuit in the instant case it is not claimed by Petitioner that her collateral constitutional rights were violated, ". . . she merely says that the process by which the decision not to rehire her was made does not comport with the fundamental fairness guaranteed her by the Fourteenth Amendment."

From 1966 to date this Court has denied certiorari for good and sufficient reasons. This Court has been consistent in its approach to this type of case.

The process by which the change sought by Petitioner is to be achieved is not through the Courts. If it is to be achieved at all, it is through the legislative halls and in collective bargaining. Indeed the Portsmouth Teachers Association has a master agreement with the Portsmouth School Board and had one when the current case arose. Article VI defines grievance and sets the grievance procedures. Excluded from the grievance procedure by agreement is any complaint of a non-tenure teacher which arises by reason of his not being re-employed. (See Appendix B)

Governmental units, federal state, county and municipal, employ an ever increasing number of persons most every one of whom goes through a probationary period. If the eight step plan sought for temporary teachers is to be mandated or "engrafted into educational administration" by the Courts then it, per force, is to be engrafted into all forms of governmental administration. (See footnote 1 *Drown v. Portsmouth* F.2d (1st Cir. 1970). *(Midoff v. Freeman*, 362 F.2d 472 (1st Cir. 1966) holding no hearing was required to guarantee due process to a dismissed probationary government employee who had been informed of the reasons for his dismissal.)

CONCLUSION

For the foregoing reasons, this Court should not grant the

petition for a writ of certiorari.

Respectfully submitted,

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Dated: April 1971

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 7695

BRYCE BEATTIE,
PLAINTIFF, APPELLANT,

v.

FRANCES W. ROBERTS, et al.,
DEFENDANTS, APPELLEES.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MAINE

Before Aldrich, *Chief Judge*,
McEntee and Coffin, *Circuit Judges*.

Charles P. Barnes II, with whom *James R. Flaker* and *Linnell, Perkins, Thompson, Hinckley & Thaxter* were on brief, for appellant.
Barnett I. Shur, with whom *Wilson, Steinfeld, Murrell & Lane, Henry Steinfeld, Charles A. Lane, Bernstein, Shur, Sawyer & Nelson, Gregory A. Tselikis*, and *George M. Shur* were on brief, for appellees.

January 6, 1971

Coffin, *Circuit Judge*. This case concerns the procedural rights of tenured public school teachers whose employment contracts are not renewed. Plaintiff, a tenured teacher, taught for five years in the Windham, Maine, school system. On November 18, 1969, the Superintending School Committee voted not to renew his contract. The Superintendent of Schools notified plaintiff of the Committee's decision in a letter dated December 13. Plaintiff requested a list of reasons for the Committee's action and a hearing before the Committee. In a letter dated December 31, the Superintendent responded, setting a hearing date for January 21, 1970, and the Committee's counsel furnished a list of reasons on January 14.

On January 21 the Committee met in executive session for the purpose of conducting the requested hearing. Both the

Committee and plaintiff were represented by counsel; witnesses were present; and a stenographer recorded the proceedings. Plaintiff's counsel raised several procedural objections. He protested because the hearing was not public, because the witnesses were sequestered, and because he was denied permission to cross-examine members of the Committee. The Committee refused to sustain any of these objections, and plaintiff declined to participate further in the proceedings. The merits of the list of reasons were never reached; the Committee's initial decision not to reemploy plaintiff remained in effect. Plaintiff brings this action, under 42 U.S.C. § 1983 against the Superintendent and the members of the School Committee alleging that he was denied due process. Summary judgement was entered by the district court after a finding that the Committee had afforded plaintiff procedural due process and that plaintiff had failed to exhaust his administrative remedies. From that decision, plaintiff appeals.

Initially, we are confronted with the question of exhaustion of administrative remedies: can plaintiff bring this action, having refused to participate in the January 21 hearing? This court has recently indicated that plaintiffs who bring § 1983 actions must normally exhaust available administrative remedies. *Dunham v. Crosby*, — F.2d — , — n. 2 (1st Cir. Dec. 18, 1970); *Drown v. Portsmouth School District*, — F.2d — , — n. 10 (1st Cir. Dec. 18, 1970). We require exhaustion, in part, because we hesitate to hold members of school committees liable for tentative dismissal decisions when they are denied the opportunity to view the issue in the light of the facts and argument which the affected teachers might introduce in a formal hearing. Plaintiff argues, however, that the procedure followed by the Committee in considering his case was not the procedure required by state statute. Having recently held that § 1983 defendants who short circuit a plaintiff's statutory procedural rights cannot assert the defense of failure to exhaust administrative remedies, *Dunham v. Crosby, supra*, we must consider plaintiff's statutory argument.

A tenured teacher's procedural rights are set forth in 20 Me. Rev. Stat. Ann. § 161(5):

> "After a probationary period of 3 years, any teacher, who receives notice in accordance with this section i.e., at least 6

months before the terminal date of the contract] that his contract is not going to be renewed, may during the 15 days following such notification request a hearing with the school committee or governing board. He may request reasons. The hearing shall be private except by mutual consent and except that either or both parties may be represented by counsel. Such hearing must be granted within 30 days of the receipt of the teacher's request."

Plaintiff presently asserts that the Committee violated this procedure in two ways. First, he reads the statute to require the Superintendent to notify a teacher before he recommends to the Committee that the teacher's contract not be renewed. According to plaintiff's theory, the teacher would then be afforded the opportunity to request the Superintendent's reasons for so recommending and a hearing before the entire Committee. If he requested such a hearing, the Committee would initially consider the issue of his non-renewal at the date of the hearing: presumably it would be improper for the Committee to consider dismissing a teacher even preliminarily if the teacher were not present.

We see no basis in the above statute for plaintiff's interpretation. Under the statute, a teacher is entitled to notice "that his contract is not going to be renewed . . .", not notice that the Superintendent has recommended non- renewal. The language contemplates action by the entire Committee before the teacher is notified. Moreover, plaintiff's interpretation assumes that there is no occasion for the Committee itself to initiate a dismissal, yet the Committee is expressly granted the power to initiate a dismissal under the Maine statute. 20 Me.Rev.Stat.Ann. § 472(4).

Plaintiff says, secondly, that he was not given an adequate statement of the Committee's reasons as required by the statute. He protests that the list of reasons came from the Committee's attorney and not from the Committee. Plaintiff's claim that the Committee must furnish its reasons before it holds a hearing is inconsistent with the interpretation of the statute urged in his first argument. The Committee could not furnish its reasons before the hearing unless it had previously considered the matter. The statute says only that the teacher has the right to "reasons", but we assume the requirement is designed primarily to assist the teacher in preparing for the

hearing before the Committee. In this case, the Committee's attorney submitted to plaintiff a detailed list of 17 incidents which underlay the Committee's November 18 action. The same attorney instructed the members of the Committee at the January 21 hearing that they were to consider only those reasons on the list. Plaintiff was clearly put on notice of the charges against him. Although the Committee preferred to characterize the list as a list of unproven charges rather than reasons, that fact did not prejudice plaintiff in any way; indeed, regarding the list as charges to be proven instead of reasons to be rebutted may have eased plaintiff's burden of proof and should have eased his mind of the matter initially discussed, namely, that the Committee had prejudged its case.

Nor are we able to attach material significance to the fact that two of the events included in the list of reasons occurred after the November 18 meeting when the Committee voted to dismiss plaintiff. We see no reason why the Committee should have ignored incidents occurring after November 18 as long as plaintiff was put on notice before the January 21 hearing of all such events the Committee would consider. The Committee could have considered those incidents, after November 18, which indicated a continuing course of improper conduct.

In fact, the Committee may have afforded plaintiff more procedural protection than he was entitled to under the statute. For example, a stenographic record of the January 21 hearing was kept. Under these circumstances, we see no justification for plaintiff's refusal to follow the proceedings through to the end.

Alternatively, plaintiff claims that the procedure was constitutionally objectionable. He argues that due process requires a completely neutral decision-maker at the hearing and that the Committee, having already made an initial decision not to renew plaintiff's contract, was not impartial. This contention is raised for the first time on appeal. At no point before or during the aborted hearing before the Committee did plaintiff suggest that it was constitutionally incompetent. His sole efforts were to achieve a public hearing, the non-sequestration of witnesses, and cross-examination of Committee members. The complaint similarly addressed alleged procedural deficiencies, not only excluding any complaint as to the incompetence of the Committee, but, as in the instance of charging its refusal to

conduct a public hearing, at least in substantial part inconsistent with any claim of incompetency. Of even greater pertinence is the fact that at no point does the record show that this matter was argued or even alluded to before the district court. After full oral argument was had and after the court read the transcript of the Committee hearing, the court accompanied its bench ruling on defendants' motion to dismiss with a summary of plaintiff's contentions–the three we have noted above–and the applicable law. On concluding, the court inquired of counsel if there were any misstatements. Plaintiff's counsel then called the court's attention to its omission of a fourth contention: that the Committee had refused to state whether it adopted any or all of the reasons contained in the January 14 letter of the Committee's counsel. The court responded and the hearing concluded.

Notwithstanding the obvious inappropriateness of considering an issue neither pleaded not argued below, which was never called to the district court's attention, *see e.g., Hap Corp. v. Heyman Mfg. Co.*, 361 F.2d 329, 331 n. 3 (1st Cir. 1966), we might on rare occasion consider it if the facts pleaded, proven, or sworn to clearly pointed to a blatant and clear deprivation of constitutional rights. This, however, is not such a case. Such law as exists on the constitutional requirement and definition of an "impartial tribunal" in cases of teacher dismissals is varied and murky. The policy implications are vast.

We have recently recognized that a determination of what procedures afforded dismissed teachers due process requires a complex balancing of interests. *Drown v. Portsmouth School District*, F.2d (1st Cir. Dec. 18, 1970). In *Drown* we considered the dismissal of a non-tenured teacher, but we have not yet confronted a case involving a tenured teacher. There is some authority for plaintiff's propositon, *Pickering v. Board of Education*, 391 U.S. 563, 578 n.2 (1968). (dictum), but we note that no court has required a school system to create the procedure plaintiff seeks.*

* There is, however, some case law to the effect that due process requires an impartial tribunal. *E.g., Ferguson v. Thomas,* 430 F2d 852, 856 (5th Cir. 1970); *Wasson v. Trowbridge,* 382 F.2d 807, 813 (2d Cir. 1967); *Esteban v. Central Missouri State College,* 277 F. Supp. 649, 651 (W.D. Mo. 1967). Some of these cases concern the expulsion of college students for disciplinary reasons where the interests to be balanced are different—perhaps materially different—from this case. *E.g., Wasson, supra; Esteban, supra.* On the other hand, some cases concerning the procedural rights of dismissed teachers are silent on the nature of the tribunal. *E.g., Roth v. Board of Regents,* 310 F. Supp. 972 (W.D. Wisc. 1970); *Lucia v. Duggan,* 303 F. Supp. 112 (D. Mass. 1969) (both cited with approval by plaintiff). In none of these cases is there any discussion of what is meant by an "impartial tribunal". Must an impartial tribunal have had no previous contact with the case, as plaintiff urges, or is a tribunal impartial if none of its members are personally interested in the outcome, *cf. Pangburn v. C.A.B.,* 311 F.2d 349, 356-58 (1st Cir. 1962)? *See generally* Wright, *The Constitution on the Campus,* 22 Vanderbilt L. Rev. 1027, 1080-81 (1969).

We see serious problems with this procedure because it would either prevent a Committee from initiating a dismissal or permit it to initiate a dismissal but then require another body of neutral outsiders to review personnel decisions that are properly the responsibility of the Committee. *See Drown, supra* at—. A requirement that the Superintendent serve as prosecutor and bring a proposed dismissal before the Committee for the first time in an adversary proceeding is inconsistent with the Maine statute authorizing the Committee to initiate dismissals. 20 Me.Rev.Stat.Ann. § 472(4). There would still be no guarantee that the Committee would not already have learned of the case in carrying out its duties. The separation of function might well be only facial and insubstantial. There would also be a greater chance of an unwise initial decision to dismiss because only one man, as opposed to the entire School Committee, would have been involved. If we require the state or municipalities to create neutral bodies to which the Committee's decision to dismiss could be appealed, we would be engrafting into educational administration an appellate layer of enormous complexity, and might well exceed the boundaries of our judicial authority and trespass into legislative territory.

Furthermore, plaintiff's dual failures to exhaust his administrative remedies and to present the issue to the district court have foreclosed any analysis of the workings of the present Maine procedures, an exploration we would deem essential to any sensible balancing of the interests of tenured teachers and school committees.

Affirmed.

APPENDIX B

AGREEMENT

BETWEEN THE

PORTSMOUTH BOARD OF EDUCATION

AND THE

PORTSMOUTH TEACHERS ASSOCIATION

July, 1969

Through

June 30, 1970

PORTSMOUTH BOARD OF EDUCATION

ADMINISTRATIVE STAFF

CONSULTANTS
Robert E. Murray, Esquire
LABOR RELATIONS CONSULTANT
METZLER ASSOCIATES

PORTSMOUTH TEACHERS ASSOCIATION

Negotiating Committee

Alvin Taylor, Esquire
Attorney

The Portsmouth, New Hampshire, Board of Education (referred to hereinafter as the "BOARD") and the Association of Portsmouth Teachers (referred to hereinafter as the "ASSOCIATION") agree as follows:

ARTICLE I

RECOGNITION

For purposes of collective negotiations the BOARD recognizes the ASSOCIATION as the exclusive representative of all professional employees of the Portsmouth School System. Professional employees shall include any individual employed by the Portsmouth School System, the qualifications for whose position are such as to require him to hold an appropriate credential issued by the State Board of Education under its regulations governing the certification of professional school personnel, EXCEPT that the term does not include superintendents, assistant superintendents, principals, assistant principals, directors, business administrators, or persons employed by the State Board of Education. The ASSOCIATION agrees to represent all such professional employees in the unit designated above without discrimination and without regard to membership in the ASSOCIATION.

ARTICLE II

NEGOTIATION PROCEDURE

A. 1. Not later than September 8th of each year, the parties agree to enter into negotiations, in accordance with the procedures set forth herein, in a good-faith effort to reach agreement on all matters raised by either party, concerning salaries and fringe benefits. Any agreement reached shall be reduced to writing and signed by the BOARD and the ASSOCIATION. Any agreement reached which requires the expenditure of public funds for its implementation shall not be binding upon the BOARD, unless, and until, the necessary appropriations have been made by the City Council. The Board shall make a good-faith effort to secure the funds necessary to implement said agreements. If such funds are not forthcoming, the BOARD and the ASSOCIATION shall resume negotiations, regarding the matters affected thereby, in accordance with the provisions of this Agreement.

2. The BOARD will make known to the ASSOCIATION

when and where information is available which the BOARD is required by law to release to the general public. Either party, may, if it so desires, utilize the services of outside consultants and may call upon professional representatives to assist in the negotiations.

B. 1. If by October 1st, the parties fail to reach agreement on any matter or matters which are the subject of negotiation, either party may declare an impasse. In the event of an impasse, either party may request the appointment of a mediator for the purpose of assisting them in reconciling their differences and resolving the controversy on terms which are mutually acceptable.

Joseph Wildebush of New York, N. Y., shall serve as mediator under this agreement. If for any reason it is impossible for Joseph Wildebush to serve as mediator the parties will attempt to select an alternate and if not possible then the parties will select a mediator from a panel presented by the American Arbitration Association. The mediator will meet with the parties or their representatives, or both, forthwith, either jointly or separately, and will take such other steps as he may deem appropriate, in order to persuade the parties to resolve their differences and effect a mutually acceptable agreement. If the dispute is not resolved prior to October 31st the mediator shall make findings of fact and recommend terms of settlement regarding the disputed materials submitted to him. Said recommendations will be advisory only and shall be made within thirty-one (31) days of his appointment. Either the BOARD or the ASSOCIATION may make such findings and recommendations public, if no agreement is reached within ten (10) days after their receipt from the mediator. The costs for the services of the mediator, including per diem expenses, if any, and actual and necessary travel and subsistence expenses, will be shared equally by the BOARD and the ASSOCIATION.

ARTICLE III

RESIGNATIONS

It is agreed that any teacher's right to resign shall not extend beyond August 1st, and the terms of the individual contracts on the subject of resignations shall prevail. The ASSOCIATION agrees to make every reasonable effort to encourage its members to comply with this Article.

ARTICLE IV

MISCELLANEOUS

A. The BOARD agrees not to negotiate with any teacher's group or organization other than the designated unit in regard to any matter subject to negotiation under Article II, Paragraph A of this Agreement as long as the ASSOCIATION shall represent a majority of the professional employees of the Portsmouth School System. Provided, however, that this shall not prevent the BOARD from communicating or consulting with any individual teacher or group of teachers for any purpose the BOARD shall deem desirable in the discharge of its responsibilities, nor shall it preclude any teacher from appearing before the BOARD in his own behalf on matters relating to employment by the BOARD.

B. The parties understand that neither the BOARD nor the Superintendent may lawfully delegate the power or authority which, by law, are vested in them, and this Agreement shall not be construed so as to constitute a delegation of said power or authority.

C. This Agreement may not be modified, in whole or in part, by the parties, except by an instrument in writing, duly executed by both parties.

D. If the parties disagree as to the meaning or interpretation of any of the provisions of this Agreement, either party may utilize the grievance procedure set forth in Article VI, in order to resolve said dispute.

ARTICLE V

DURATION

The provisions of this Agreement will be effective as of July 29, 1969 except as otherwise herein provided, and will continue and remain in full force and effect until June 30, 1970, and will automatically renew itself thereafter for successive terms of one (1) year each, unless, by September 15th next, prior to expiration of the contract year, either the BOARD or the ASSOCIATION gives written notice to the other of its desire to modify or terminate this Agreement.

ARTICLE VI

GRIEVANCE PROCEDURE

Definition:

A "Grievance" shall mean a complaint by an employee of the Public School System that there has been to him a personal loss, injury or inconvenience because of a violation, misinterpretation or inequitable application of an established agreement governing employees except that the term "grievance" shall not apply to (a) any matter for which a specific method of review is prescribed by law or (b) any rule or regulation of the State Commissioner of Education or (c) any by-law of the Board of Education pertaining to its internal organization or (d) any matter which according to law is either beyond the scope of the Board authority or limited to unilateral action by the Board alone (e) a complaint of a non-tenure teacher which arises by reason of his not being re-employed (f) or a complaint by any certificated personnel occasioned by appointment to or lack of appointment to, retention in or lack of retention in any position for which tenure is either not possible or not required. A grievance to be considered under this procedure must be initiated by the employee within thirty (30)calendar days of its occurence, or within thirty (30) calendar days of when the employee should have known of its occurence.

Procedure:

1. (a) Failure at any step of this procedure to communicate the decision on a grievance within the specified time limits shall permit the aggrieved employee to proceed to the next step. Failure at any step of this procedure to appeal a grievance to the next step within the specified time limits shall be deemed to be acceptance of the decision rendered at that step.

   (b) It is understood that employees shall, during and notwithstanding the pendency of any grievance, continue to observe all assignments and applicable rules and regulations of the Board until such grievance and any effect thereof shall have been fully determined.

2. Any employee who has a grievance shall discuss it first with his Principal (or immediate superior or department head, if

applicable) in an attempt to resolve the matter informally at that level.

3. If as a result of the discussion, the matter is not resolved to the satisfaction of the employee within five (5) school days, he shall set froth his grievance in writing to the Principal specifying:

(a) The nature of the grievance and date occured.
(b) The nature and extend of the injury, loss or inconvenience.
(c) The results of previous discussions.
(d) His dissatisfaction with decisions previously rendered.

The Principal shall communicate his decision to the employee in writing within three (3) school days of receipt of the written grievance.

4. The employee, no later than five (5) school days after receipt of the Principal's decision, may appeal the Principal's decision to the Superintendent of Schools. The appeal to the Superintendent must be made in writing reciting the matter submitted to the Principal as specified above and his or her dissatisfaction with decisions previously rendered. The Superintendent shall meet with the employee to attempt to resolve the matter as quickly as possible but within a period not to exceed ten (10) school days. The Superintendent shall communicate his decision in writing to the employee and the Principal.

5. If the grievance is not resolved to the employee's satisfaction, he no later than five (5) school days after receipt of the Superintendent's decision may request a review by the Board of Education. The request shall be submitted in writing through the Superintendent of Schools who shall attach all related papers and forward the request to the Board of Education. The Board, or a committee thereof, shall review the grievance and shall, at the option of the Board, hold a hearing with the employee and render a decision in writing within thirty (30) calendar days of receipt of the grievance by the Board or of the hearing with the employee, whichever comes later.

6. If the decision of the Board does not resolve the grievance to the satisfaction of the employee grievant and he wishes review by a third party, he shall so notify the Association within ten (10) school days of receipt of the

Board's decision. If the Association determines that the matter should be reviewed further, it shall so advise the Board through the Superintendent within twenty (20) school days of receipt of the Board's decision. The Board will refer the matter to Mr. Steven McClosky or his designee, who will serve as arbitrator.

7. (a) The arbitrator shall limit himself to the issues submitted to him and shall consider nothing else. He can add nothing to, nor subtract anything from the Agreement between the parties. The recommendations of the arbitrator shall be advisory only.

(b) Rights of Teachers to Representation

(1) Any aggrieved person may be represented at all stages of the grievance procedure by himself, or, at his option, by the Association by a representative selected or approved by the Association.

(c) (2) When a teacher is not represented by the Association in processing of a grievance, the Association shall at the time of submission of the grievance to the Superintendent or any later level, be notified by the Superintendent that the grievance is in process and has the right to be present and present its position in writing at all hearings and sessions held concerning the grievance and shall reeeive a copy of all decisions rendered.

(3) The Board and the Association shall assure the individual freedom from restraint, interference, coercion, discrimination or reprisal in presenting his appeal with respect to his personal grievances.

B. Costs

1. Each party will bear the total cost incurred by themselves.

2. The fees and expenses of the arbitrator are the only costs which will be shared by the two parties and such costs will be shared equally.

ARTICLE VII

EXTENDED LEAVES OF ABSENCE

A. Military leave, without pay, of up to two (2) years will

be granted to any teacher who is inducted or enlists in any branch of the Armed Forces of the United States. Upon return from such leave, a teacher will be placed on the salary schedule at the level which he would have achieved had he remained actively employed in the system during the period of his absence.

B. Maternity leave for teachers on continuing contracts of one (1) school year will be granted, without pay or other benefits. A teacher who becomes pregnant shall notify the Superintendent in writing as soon as pregnancy has definitely been determined. Continued employment will, normally, be possible until the end of the fifth (5th.) month of pregnancy. However, if the teacher's physical condition warrants it, the Superintendent may require earlier termination of her employment under this section. The teacher on maternity leave must notify the Superintendent in writing of her intention to return to her position by May 1 next, preceding the beginning of the school year.

C. Other leaves of absence, without pay, may be granted at the discretion of the BOARD.

D. All benefits to which a teacher was entitled at the time his leave of absence commenced, including unused accumulated sick leave, will be restored to him upon his return, and he will be assigned to the same position which he held at the time said leave commenced, if available, or a substantially equivalent position for which he is certified as soon as said position becomes available.

E. In the case of leaves granted under Section A, B, or C, such teacher shall, after notifying the Superintendent in writing of her availability to return to teaching be assigned to the same position which she held at the commencement of such leave, when, and if, a vacancy occurs in such position.

F. Leaves of absence granted under this Article shall be for a minimum period of one (1) year, except when otherwise ordered by the Board.

G. All requests for extensions or renewals of leaves will be applied for in writing and if granted the teacher will be notified in writing.

ARTICLE VIII

DUES DEDUCTION

A. The Board agrees to deduct from the salaries of its employees dues for the Association of Portsmouth Teachers, the New Hampshire Education Association and/or The National Education Association, or any one (1) of such associations, as said teachers individually and voluntarily authorize the Board to deduct and to transmit the monies promptly to such Association or Associations.

ARTICLE IX

SICK LEAVE

Teachers will be entitled to ten (10) sick leave days each school year, as of the first official day of said school year. Sick leave days may be accumulated from year to year, with a maximum limit of one hundred and twenty (120) days.

ARTICLE X

TEMPORARY LEAVES OF ABSENCE

Teachers will be entitled to the following temporary leaves of absence, with full pay each school year.

A. Individual leave may be granted to teachers by the administration for various reasons during the contract year.

B. The total number of days that can be granted for an individual teacher during any one school year is not to exceed five (5) days.

C. Each teacher shall be entitled to the allowance of full salary for these days providing that the policies of the Portsmouth Board of Education for individual leaves are met.

D. The five (5) individual leave days are not cumulative from one year to another.

E. Provisions:

1. Leave will be granted for the death of a member of their immediate family. Members of the immediate family include.

(a) Parents
(b) Husband
(c) Wife
(d) Son
(e) Daughter
(f) Sister
(g) Brother
(h) Parental-in-laws
(i) Brother-in-law
(j) Sister-in-law

2. Personal business that cannot be transacted at any other reasonable time may be considered for individual leave. This day should not occur just prior to, or following school holidays or vacations.

3. Attendance at graduation ceremonies for son, daughter or spouse will be considered for individual leave up to a maximum of two (2) days per school year.

ARTICLE XI

SABBATICAL LEAVES

Upon recommendation by the Superintendent of Schools, sabbatical leaves may be granted to members of the teaching staff by the Board for study, including study in another area of specialization, subject to the following conditions:

1. The teacher has completed at least seven (7) consecutive full school years of service in the Portsmouth School System.

2. Sabbatical leaves may be for a full or a half of a year. If leave is for a full year or a half year the teacher will be paid by the Board at fifty per cent (50%) of the salary rate he would have received had he remained on active duty.

3. Request for sabbatical leave must be received by the Superintendent of Schools in writing, in such form as may be required by the Superintendent, no later than November 15 of the year preceding the school year for which the sabbatical leave is requested.

4. Each teacher must agree to return to service in the Portsmouth Public Schools immediately upon termination of sabbatical leave and to continue in such service for a period of two (2) years, unless physical disability makes this impossible or there is mutual agreement to the contrary.

ARTICLE XII

SALARIES

A. The salary scale of all professional employees is set forth in appendix attached hereto and made a part hereof.

B. The salaries shall be payable in equal installments every other Friday throughout the school year, beginning on the second Friday after Labor Day, unless Friday is a legal holiday, payment will be made on the following Monday. The remainder of that year's salary shall be paid to each teacher on the last day of school in June.

ARTICLE XIII

INSURANCE

The Board shall provide each teacher with Blue-Cross Blue-Shield benefits by paying 100% of a single membership for each teacher not to exceed the sum of $114.00 during the year 1970-1971.

ARTICLE XIV

ASSOCIATION PRIVILEGES

A. There will be no reprisals of any kind taken against any teacher by reason of his membership in the Association or participation in its lawful activities.

B. The Board will, upon request, make known to the Association when and where information is available, such information as the Board is required to release to the general public.

C. The Executive Committee of the Association will have the right to place notices, circulars and other material in teachers' mailboxes, provided that such materials shall not relate to local, state or national political matters. Copies of all such material will be given to the Building Principal and the Superintendent in advance but their approval will not be required.

ARTICLE XV

GENERAL

A. If any provisions of this Agreement or any application

of the Agreement to any employee or group of employees shall be found contrary to law, then such provision or application shall not be deemed valid and subsisting except to the extent permitted by law, but all other provisions or applications will continue in full force and effect.

B. Copies of this Agreement will be provided at Board expense and a copy given to each teacher by the opening of school in September.

ARTICLE XVI

OTHER AREAS OF CONCERN

This agreement does not preclude the continuance of discussion and negotiation on the subjects of teaching hours and load, teacher employment, teacher assignment, teacher evaluation, vacancies and promotions and other areas of concern and when and if, agreement is reached on said issues they may be appended to this agreement and shall become a part hereof by reference.

Salary Schedule
Effective - September, 1970

Degree

Steps	1969-70	1970-71
1	$ 6000	$ 6300
2	6360	6678
3	6720	7056
4	7080	7434
5	7440	7812
6	7800	8190
7	8160	8568
8	8520	8946
9	8880	9324
10	9240	9702
11	9600	10,280

No-Degree

Steps	1969-70	1970-71
1	$ 5050	$ 5303
2	5150	5408
3	5250	5513
4	5350	5618
5	5500	5775
6	5650	5933
7	5800	6090
8	5950	6248
9	6100	6405
10	6250	6563
11	6350	6668
12	6550	6878

Special No-Degree Industrial Arts & Nurses

Steps	1969-70	1970-71
1	$ 5000	$ 5250
2	5200	5460
3	5400	5670
4	5600	5880
5	5800	6090
6	6000	6300
7	6200	6510
8	6400	6720
9	6600	6930
10	6800	7140
11	7000	7350
12	7200	7560

Fringe Benefits

1. Full payment of individual membership in Blue Cross/Blue Shield or those teachers who wish it.
2. Payment of the cost up to $40.00 per credit hour for course work, up to six credits per year.
3. Sick leave of 10 days per year accumulative to 120 days.
4. Longevity

20 years experience	$150.00
25 years experience	$300.00

Increments for credits beyond the Bachelor's Degree

	1969-70	1970-71
Bachelor's plus 15 credits	$ 200	$ 250
Master's Degree	600	700
Master's Degree plus 15 credits	800	1,000
Master's Degree plus 30 credits	1,000	1,200
Department Heads		
Senior High School	600	800
Junior High School	300	400

The Directors' salary shall be 6.5 percent increase over the past year's total contract salary and they shall receive all the fringe benefits granted to the teachers.

Those principals working on a 10-month basis per year shall receive 7.5% increase over the past year's total contract salary and those principals working on an 11-month basis per year shall receive 10% increase over the past year's total contract salary. These principals shall receive all the fringe benefits granted to the teachers.

Coaches

Football	1969-70	1970-71
Varisty - Head Coach	$1500	$1500
Varsity - Asst. Coach	800	800
J.V. - Head Coach	700	700
J.V. - Asst. Coach	600	600
Freshman Coach	500	500
Freshman Asst.	300	300

Basketball	1969-70	1970-71
Varsity - Head Coach	$ 1500	$ 1500
J.V. Coach	800	800
Freshman Coach	500	500
Sr. High "B" Team	300	300
Jr. High Varsity	500	500
Jr. High "B" Team	300	300
Baseball		
Varsity - Head Coach	1000	1000
J.V. Coach	500	500
Freshman Coach	400	400
Jr. High Coach	300	300
Track (3 seasons)		
Varsity Coach	1500	1500
Asst. Coach	800	800
Soccer		
Varsity Coach	500	500
Asst. Coach	300	300
Hockey		
Varsity Coach	300	300
Golf		
Varsity Coach	300	300
Tennis		
Varsity Coach	300	300
Cheerleading		
Varsity Coach	400	400
Girls' Varsity Sports		
Field Hockey	200	200
Ski Team	200	200
Track	200	200

Bowling (Girls & Boys)	**1969-70**	**1970-71**
Senior High	$ 200	$ 200
Intramurals		
Boys		
4 nights per week	400	400
2 nights per week	200	200
Girls		
4 nights per week	400	400
2 nights per week	200	200
Supervision of students in skiing and swimming intramurals	$2.50 per hr.	$2.50 per hr.
Other Administrative or Supervisory Positions		
Elementary Supervisors		
(Art, Music, Physical Edu.)	500	500
Reading Coordinator	500	500
Guidance Counselors	500	500
Early Arrivals	180	180
Stage - Junior High	200	200
Debating	300	300
Audio-Visuals	500	500
Photography	400	400
Year Book	500	500
Dramatics	500	500
Assistant	200	200
Elementary Band	300	300
Newspaper	100	100